

# The right to parody at the intersection between freedom of expression and trademark law: an analysis of the legal framework of the European Union and Switzerland

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Growing tensions between intellectual property rights and human rights are best illustrated through trademark parody, which has recently been the subject of contradictory judgments in Europe. Although there is a parody “exception” in copyright legislation, should lawmakers follow the same route with respect to trademark law and recognise it as a genuine “right” instead of referring to it as a mere “exception”?

Die wachsenden Spannungen zwischen Immaterial- und Grundrechten lassen sich am besten am Beispiel der Markenparodie, welche zuletzt Gegenstand mehrerer sich widersprechender Urteile in Europa war, aufzeigen. Soll der Gesetzgeber nun dem Beispiel des Urheberrechts, dem eine Parodieschranke immanent ist, folgen oder soll er die Parodie als eigenständiges Recht und nicht nur als Schranke anerkennen?

Croissantes, les tensions entre droits de la propriété intellectuelle et droits humains trouvent une parfaite illustration dans la parodie des marques. Cette dernière a fait l’objet de décisions contradictoires en Europe ces dernières années. Alors que le droit d’auteur connaît une «exception» de parodie, le législateur ne devrait-il

pas en ériger une aussi pour les marques? Plus généralement, ne devrait-on pas parler de «droit» plutôt que d’«exception»?

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## I. Introduction

Over the past decades, various court cases have highlighted the growing tension between human rights and intellectual property rights. The resulting conflicts are the subject of intense academic interest worldwide<sup>1</sup>, for exam-

ple, in the area of pharmaceutical patents versus the right to healthcare on the African continent<sup>2</sup>. In Europe, this conflict is best illustrated by trademark parody, weighing freedom of expression on the one hand and trademark law protection on the other. If Pierre Desproges was right when he asserted “*on peut rire de tout, mais pas avec n’importe qui*”, perhaps the jurist in him would have rather said “*mais pas n’importe comment*”. On this matter, European courts have issued several decisions that appear contradictory at first glance, as some validate trademark parodies while others negate them. These rulings therefore suggest that there are different ways in which trademarks can be parodied – some legal, others illegal – in a general context in which freedom of expression appears to be challenged today<sup>3</sup>.

Juristenvereins (ZBJV) 153/2017, 365 et. seq.; L. HELFER/G. AUSTIN, Human Rights and Intellectual Property: Mapping the Global Interface, Cambridge 2011, 1 et. seq.; C. GRABER, Copyright and Access – a Human Rights Perspective, in: C. Graber/S. Govoni/D. Girsberger/M. Nenova (eds.), Digital Rights Management: The End Of Collecting Societies?, Berne 2005, 71 et. seq.

<sup>2</sup> I. ELANGI BOTOY, Propriété intellectuelle et droits de l’homme: l’impact des brevets pharmaceutiques sur le droit à la santé dans le contexte du VIH/SIDA en Afrique, Thèse, Geneva 2007.

<sup>3</sup> See: Chapatte’s editorial after the *New York Times* published an anti-semitic cartoon: CHAPATTE, Quand on attaque le dessin de presse, c’est la liberté qu’on attaque, *Le Temps*, 11 June 2019; DE GRAFFENRIED, Dessin de presse : fini de rire, *Le Temps*, 11 June 2019. Beyond that, some authors have expressed their deep concern, rightly

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<sup>1</sup> On this issue C. RIGAMONTI, Urheberrecht und Grundrechte, *Zeitschrift des Bernischen*